

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

PETER G. MALYCKY and
JENNIFER A. MALYCKY
A/K/A JENNIFER A. PIKE,

Chapter 7

Case No.: 10-72554 (REG)

Debtor(s).

-----X

MICHAEL McENTEE,

Plaintiff(s),

Adversary Proceeding
Number

-against-

10-8310-REG

PETER G. MALYCKY,

Defendant(s).

-----X

NOTICE OF MOTION TO DISMISS IN LIEU OF ANSWER

PLEASE TAKE NOTICE that upon the annexed affirmation of Richard F. Artura, Esq., a motion pursuant to BR 7012(b)(6) will be made as set forth below:

JUDGE: Hon. Robert Grossman

RETURN DATE AND TIME: July 5, 2011 at 10:00 a.m.

PLACE: U.S Bankruptcy Court
290 Federal Plaza, Room 860
Central Islip, NY 11722

RELIEF REQUESTED: Order dismissing Count IV of the Amended Complaint for failure to state a claim upon which relief can be granted and for such other relief as the Court deems just.

Dated: June 23, 2011
Lindenhurst, New York

Phillips, Weiner, Artura, Cox & McDonough
Attorneys for Debtor Peter G. Malycky
165 South Wellwood Avenue
Lindenhurst, New York 11757
(631) 226-2100

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AFFIRMATION IN SUPPORT

RICHARD F. ARTURA, ESQ., an attorney admitted to practice affirms:

1. I am a member of the firm Phillips, Weiner, Artura, Cox & McDonough, attorneys for the debtor/defendant, Peter G. Malycky.

2. This affirmation is in support of this motion to dismiss Count IV of the Amended Complaint in lieu of answer for plaintiff's failure to state a claim upon which relief can be granted.

3. Count IV of the Amended Complaint does not allege fraud with any specificity.

4. As held by Judge Eisenberg in In Re Yerushalmi (Bky. E.D.N.Y. 2008), Bankruptcy No.: 07-72186-478, Adversary No.: 08-8037-478, September 4, 2008:

"11 U.S.C. §523(a)(2)(A) provides as follows:

(a) A discharge under section 727... does not discharge an individual debtor from any debt --

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by --

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

The elements of a non-dischargeability claim under §523(a)(2)(A) have been described by this Court and others as follows:

(1) the debtor made the representations; (2) at the time he knew they were false; (3) the representations were made with the intention and purpose of deceiving the creditor; (4) the creditor relied on such representations; and (5) the creditor sustained the alleged loss and damage as the proximate result of the representations having been made.

Grad v. Behham (In re Yacov Benham), 2005 Bankr. LEXIS 435, *15 (Bankr. E.D.N.Y. 2007); see People of the State of New York v. Suarez (In re Suarez), 367 B.R. 332, 338 (Bankr. E.D.N.Y. 2007).

Plaintiffs have failed to meet the elements required for §523(a)(2)(A). The complaint is unclear as to what the representations were that Defendant made to Plaintiffs that were false and intended to deceive them. The complaint also lacks particularity as to the fraud committed by the Defendant. Accordingly, the Plaintiffs' First Cause of Action shall be dismissed without prejudice, for failure to state a cause of action, and for failure to plead with particularity.

...

Rule 9(b) provides that "[i]n all averments of fraud... the circumstances constituting fraud... shall be stated with particularity." A plaintiff must set forth the particulars of the acts or omissions alleged so the defendant has adequate notice of the purported wrong and can frame a defense. See Luce v. Edelstein, 802 F.2d 49, 54 (2d Cir. 1986); Denney v. Barber, 576 F.2d 465, 469 (2d Cir. 1978). The "circumstances constituting fraud" are the facts telling when and where the alleged fraud took place, who was involved, the nature of the fraudulent action and how it was accomplished. Parnes v. Gateway 2000, Inc., 122 F.3d 539, 549-50 (8th Cir. 1997).

5. The Amended Complaint in the instant action is a short summation without any of the particularity required under Bankruptcy Rule 7009.

6. As in the Yerushalmi case, this cause of action under §523(a)(2)(A) must be dismissed for failure to plead fraud with particularity.

WHEREFORE, the defendant respectfully requests an Order dismissing Count IV of The Amended Complaint.

Dated: June 23, 2011
Lindenhurst, New York

/s/ Richard F. Artura, Esq.
Phillips, Weiner, Artura, Cox & McDonough
Attorneys for the Defendant Peter G. Malycky
165 South Wellwood Avenue
Lindenhurst, New York 11757
(631) 226-2100

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Debtor(s).

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MICHAEL McENTEE,

Plaintiff(s)

-against-

PETER G. MALYCKY,

Defendant(s).

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STATE OF NEW YORK)
COUNTY OF SUFFOLK)

**AFFIDAVIT OF SERVICE
BY MAIL**

Chapter 7

Case No.: 10-72554-REG

Adversary Proceeding

Number: 10-8310-REG

RYANNE BARBER, the undersigned being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides in West Babylon, NY 11704

That on June 23, 2011 deponent served the annexed NOTICE OF MOTION on

Farrell Fritz, PC
1320 RXR Plaza
Uniondale, NY 11556

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper - in a post office - official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

S/RYANNE BARBER
RYANNE BARBER

Sworn to before me this
23rd day of June, 2011

S/RICHARD F. ARTURA
NOTARY PUBLIC

**UNITED STATES BANKRUPTCY COURT
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**CHAPTER 7
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Debtor(s).

MICHAEL McENTEE

**Adversary Proceeding No:
10-8310-REG**

Plaintiff(s),

-against-

PETER G. MALYCKY,

Defendant(s).

NOTICE OF MOTION

**Richard F. Artura, Esq.
Phillips, Weiner, Artura, Cox & McDonough
Attorneys for Defendant
165 South Wellwood Avenue
Lindenhurst, NY 11757**

Service of a copy of the within is hereby admitted.

Dated: _____

Attorney(s) for

SIR: PLEASE TAKE NOTICE

[] NOTICE OF ENTRY: that the within is a (certified) true copy of a _____ duly entered in the office of the clerk of the within named court on _____

[] NOTICE OF SETTLEMENT: that an order _____ of which the within is a true copy will be presented for settlement to the HON. _____ one of the judges of the within court, at _____ on _____ at _____

Certified pursuant to 22 NYCRR Part 130-1.1-a

Dated:

Yours, etc.,

TO: _____

**BY: Richard F. Artura, Esq.
Phillips, Weiner, Artura, Cox & McDonough
165 South Wellwood Avenue
Lindenhurst, NY 11757
(631) 226-2100**

Attorney(s) for: